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SUPREME COURT, U. S.

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No. 175

In the Supreme Court of the United States

OCTOBER TERM, 1961

BILTMORE HOMES, INC., AND FRANK B. COOPER, CHARLES F. COOPER, JAMES D. COOPER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The sole issue involved concerns the amount of income realized by Biltmore Homes, Inc., and by its three shareholders, officers and directors, Frank, Charles and James Cooper, on the sale of 90 houses in 1947. The answer to this question depends upon a resolution of an alleged $99,000 difference between the computations of the Commissioner and the taxpayers with respect to the cost of constructing the houses.[1]

The Commissioner had determined that the cost of construction did not exceed $360,000, or $4,000 per

[1] The taxpayers do not question the Commissioner's determination and the findings of the courts below as to the amount realized from the sale of the houses (see Pet. 3–4).

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house (see Pet. App. 11). The three brothers, having conceived of a plan by which Biltmore Homes, Inc., Perpetual Building and Loan Association of Columbia, and Mutual Savings and Loan Association, three corporations which were controlled by the brothers, would enter into a complex series of transactions, argued that, as a result of these transactions, they had no net income in 1947. They contend that Biltmore was obligated to pay the contractor $459,000, or $5,100 per house, for construction costs, and that either Biltmore, Perpetual or Mutual reimbursed the contractor to the extent of $459,000. Alternatively they contend that, if the contractor had been reimbursed only $360,000, then either Perpetual or Mutual retained the $99,000 balance of the proceeds, so that neither Biltmore nor the Coopers ever received this amount (see Pet. App. 13).[2]

[2] The court of appeals properly pointed out (Pet App. 12) that the only reasonable explanation for the complex transactions was that the brothers hoped to make it appear that one or the other or both of their tax-exempt corporations (Perpetual and Mutual) received the profit so that the brothers could escape taxation altogether. In 1952, the Commissioner retroactively revoked Perpetual's tax exempt status as of 1945. See *Perpetual Building and Loan Association of Columbia* v. *Commissioner*, 34 T.C. 694, 709–715, affirmed *per curiam sub nom. Estate of Cooper* v. *Commissioner*, 8 A.F.T.R. 2d 5045 (C.A. 4th, June 19, 1961). The revocation was upheld because, *inter alia*, Perpetual had frequently been used to finance the Coopers' real estate transactions, including the transaction involved here, and because, at various times during 1946–1949, the Cooper family had received from Perpetual dividend credits to their accounts amounting to 200 to 600 percent of their original investments, whereas other shareholders had received no more than 4 percent annually.

Upon careful analysis of the evidence adduced at the trial, both courts below completely rejected the taxpayers' contentions and upheld the Commissioner's determination, observing that neither Biltmore nor anyone acting on its behalf paid the contractor more than $360,000 to construct the houses, and that the $99,000 of profits found their way into the pockets of the Cooper brothers.

This Court will not review concurrent findings of fact in the absence of exceptional error. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214; *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51. Since the taxpayers have failed to demonstrate that error has been committed, and since the question involved is limited to the facts of this case and is not of general importance, there is no warrant for review by this Court.

Respectfully submitted,

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